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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 365

CANTON COMPANY OF BALTIMORE,
Appellant,

v.

COMPTROLLER OF THE TREASURY,
RETAIL SALES TAX DIVISION,
STATE OF MARYLAND,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal or to affirm the judgment sought to be reviewed on the following grounds:

(a) The judgment below rests on an adequate non-Federal basis;

(b) The appeal does not present a substantial Federal question.

STATEMENT

This is an appeal from a decision of the Court of Appeals of Maryland affirming an order of the Baltimore City Court which modified and affirmed an order of the Comptroller of the State of Maryland denying Appellant's petition for an abatement of an assessment under the Maryland Retail Sales Tax Act. The assessment made by the Retail Sales Tax Division of the Office of the Comptroller concerns sales taxes for the period from June 1, 1955, through June 30, 1960, on rentals paid to Appellant by The Cottman Company. The Cottman Company since October, 1931, has rented certain cranes and other unloading machinery and equipment from the Appellant. The rental facilities have been used by Cottman to unload ships. The primary rental applicable through the assessment period consisted of 20 cents per ton on all cargo handled by The Cottman Company through use of the unloading facilities, plus 30% of The Cottman Company's net income before taxes in excess of $15,000.

The Maryland Retail Sales Tax Act was first enacted by Chapter 281 of the Acts of 1947 of the General Assembly of Maryland. It did not apply to leases. By Chapter 332 of the Acts of 1955 of the General Assembly of Maryland the definition of "sale" was amended to read, *inter alia*, as follows:

> Article 81, Section 324(d).
>
> "(d) 'Sale' and 'selling' mean any transaction whereby title or possession, or both, of tangible personal property is or is to be transferred by any means whatsoever for a consideration, *including rental, lease or license to use, or royalty,* by a vendor to a purchaser, . . ."
>
> (The italicized language was inserted by Chapter 332 of the Acts of 1955.)

The Comptroller of the Treasury of Maryland has consistently contended that under the Maryland Retail Sales Tax law, as amended in 1955, the rentals of the cranes and other equipment involved herein were "sales" and that the retail sales tax on those rentals was not a direct tax on interstate or foreign commerce but was a tax on a completely Maryland transaction — "a sale" — involving two Maryland corporations. The Hearing Examiner of the Comptroller of the Treasury of Maryland, a judge of the Baltimore City Court and the Court of Appeals of Maryland (by a unanimous decision) all have held that the tax was on a completely Maryland transaction — "a sale" — involving one Maryland corporation as "seller" and another Maryland corporation as "buyer".

ARGUMENT

I. THE JUDGMENT BELOW RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

The Appellant challenges a part of the decision of the Court of Appeals of Maryland which is determinative of the question involved in the case and which rests on an adequate non-Federal basis. On page 9 of the Jurisdictional Statement, Appellant contends that the tax here is based on the continuance of possession of the cranes and is therefore a use tax rather than a sales tax.

This argument, as made, disregards the statute and the three prior decisions in this case (including the unanimous decision of the highest court of the State of Maryland) which interpreted the statute and held that the tax was a sales tax on a Maryland sale. Appellant makes this argument since it is apparently conceded that prior cases of this Court involving the sales tax would preclude the constitutional argument which the Appellant seeks to advance. The leading case concerning a sales tax in which the question was raised as to whether or not the fact that the goods

were purchased for use exclusively in interstate commerce would make the tax unconstitutional is *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U.S. 147, 52 S. Ct. 340, 76 L. Ed. 673 (1932). That case involved the purchase by a Delaware corporation of gasoline in South Carolina for use in its planes exclusively in interstate commerce. In that case this Court said:

> "... But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a non-discriminatory tax imposed by the State upon intrastate dealers. There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected."

The Appellant seeks to find some solace in the case of *Helson & Randolph v. Kentucky*, 279 U.S. 245, 49 S. Ct. 279, 73 L. Ed. 683 (1929), which involved a use tax which Kentucky attempted to collect from a resident of Illinois who did an exclusively interstate ferry business between Kentucky and Illinois and used gasoline which he purchased outside Kentucky to power his ferry. That case was distinguished in the *Eastern Air Transport* case cited above and may be distinguished from this case on the precise non-Federal question decided by the Court of Appeals of Maryland.

The Maryland Court of Appeals interpreted the Maryland statute as defining sales to include rentals and placing

a sales tax on rentals and not a use tax on rentals. This court has consistently held that where the State courts and the highest court of a State have consistently interpreted a State statute, such as the one involved here, as providing a sales tax on rentals rather than a use tax on rentals, such interpretation, while not always conclusive, has great weight in the determination of the natural and reasonable effect of a statute by the Supreme Court. *Railway Express Company v. Virginia*, 358 U.S. 434, 79 S. Ct. 411, 3 L. Ed. 2d 450 (1959) and cases cited therein. See also *General Trading Co. v. State Tax Commission*, 322 U.S. 335, 64 S. Ct. 1028, 88 L. Ed. 1309 (1944), where state court application of local laws was held to be controlling. In a case such as this where the statute clearly provides that the tax on rentals is a sales tax and the Maryland courts have consistently so held, this court should accept the decision of the highest court of Maryland that the tax involved is a sales tax. Since both the Appellant and The Cottman Company are Maryland corporations and since it is admitted that the lease arrangements were entered into in Maryland and the cranes and equipment involved have continuously been located in Maryland, the decision of the Maryland Court of Appeals rests on an adequate non-Federal basis in that the actual rental transaction is a completely local transaction and the fact that The Cottman Company actually uses the cranes to unload ships does not in any way invalidate the tax imposed. Of great interest on the point is the opinion of the Supreme Court of Ohio in the very recent case of *Alside, Inc. v. Bowers*, 174 Ohio St. 463, 190 N.E. 2d 274 (1963), which involved a sales tax on rentals of tractors and trailers to be used solely in transporting goods in interstate commerce. In that case the lessor corporation was not an Ohio corporation and was not licensed to do business in Ohio. Even though the transaction in that case was not as completely an Ohio transac-

tion as the transaction in this case is a completely Maryland transaction, the Ohio Supreme Court found that the tax was a sales tax and not a use tax and that the tax was constitutional. The arguments advanced by Alside in that case were precisely the same as the arguments advanced in the instant case. The time for appealing the *Alside* case, to the Supreme Court has expired.

II. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Even if the tax in the instant case were found to be a use tax rather than a sales tax, in direct contradiction of the decision of the Court of Appeals of Maryland, this case does not present a substantial Federal question and there are many cases of this Court which have ruled on the question sought to be presented by the Appellant and decided the issue adversely to the contentions of the Appellant. There have been a great many cases of this court involving in effect what was conceded to be a use tax in which this court has held that the use tax was not unconstitutional even though the items taxed were to be used in interstate commerce. All of these cases distinguish the *Helson & Randolph* case, *supra*, and all show that the *Helson & Randolph* case, if it has any validity at all, is limited to the precise factual situation involved therein. The two leading cases involving use taxes are the companion cases of *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 59 S. Ct. 389, 83 L. Ed. 586 (1939), and *Pacific Telephone and Telegraph Company v. Gallagher*, 306 U.S. 182, 59 S. Ct. 396, 83 L. Ed. 595 (1939). See also *Nashville, Chattanooga & St. Louis Railway v. Wallace*, 288 U.S. 249, 53 S. Ct. 345, 77 L. Ed. 730 (1933), involving an excise tax on gasoline purchased outside Tennessee and stored in Tennessee until used solely in interstate business; *Edelman v. Boeing Air*

Transport, Inc., 289 U.S. 249, 53 S. Ct. 591, 77 L. Ed. 1155 (1933), involving a state excise tax levied upon the removal of gasoline from storage tanks for use in interstate commerce; *Denver and Rio Grande Western Railroad Company v. State Tax Commission*, 11 Utah 2d 301, 358 P. 2d 352 (1961), *cert. den.* 368 U.S. 830, 82 S. Ct. 52, 7 L. Ed. 2d 33 (1961), involving a sales tax on monies paid to a railroad for services in repairing cars of other railroads used as exchange equipment in interstate commerce.

The Appellant seeks to distinguish the *Southern Pacific Co. v. Gallagher* case and the *Pacific Telephone and Telegraph Company v. Gallagher* case, alleging that these decisions rest on the ground that there was a moment in time prior to the dedication to interstate commerce of the objects taxed which afforded a local, intrastate instance to sustain the tax. Assuming, *arguendo*, that this is the only basis for the decisions, there is a moment of time in this case as well. Each time that The Cottman Company pays rent to the Appellant, it obtains the right to possession of the leased property. In actuality, the right to possession of the cranes and other equipment is retransferred every time rental is paid. The Appellant argues that these cranes were dedicated to commerce at the time they were first leased to The Cottman Company and that at no time thereafter could the rentals be considered a local transaction. The Appellant's argument would mean that if a Maryland corporation did today lease a crane to another Maryland corporation which intended to use the crane in interstate commerce, only the first rental payment could be taxed and all subsequent rental payments could not be taxed because the crane was already in use in interstate commerce. If, in fact, the lessor allowed the lessee to use the crane for a month rent-free, then, under Appellant's contentions, no part of the rental would be taxable.

The Appellant seeks to rely on the case of *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90, 58 S. Ct. 72, 82 L. Ed. 68 (1937), and *Joseph v. Carter & Weekes Company*, 330 U.S. 422, 67 S. Ct. 815, 91 L. Ed. 993 (1947). Both of these cases involved a direct gross receipts tax on the income from stevedoring. They did not seek to tax a local transaction such as the sale (rental) in the instant case. In addition, in the *Puget Sound Stevedoring Co.* case this Court said:

> "The business of appellant, in so far as it consists of supplying longshoremen to shipowners or masters without directing or controlling the work of loading or unloading, is not interstate or foreign commerce, but rather a local business, and subject, like such business generally, to taxation by the State.
>
> "What is done by appellant in connection with activities of this order is similar in many aspects to the work of a ship's chandler, and even more closely similar to that of a labor or employment bureau. Such a bureau was considered in Williams v. Fears, 179 U.S. 270, 278, 45 L. ed. 186, 190, 21 S. Ct. 128, and its business found to be no part of interstate or foreign commerce, though the transactions of such commerce were increased thereby."

Further, in the case of *Canton Railroad Co. v. Rogan*, 340 U.S. 511, 71 S. Ct. 447, 95 L. Ed. 488 (1951), this court considered a Maryland franchise tax on steam railroad companies measured by gross receipts apportioned to the length of their lines within the State of Maryland. At that time and now all of Canton's lines are within the State of Maryland. The income which Canton received from The Cottman Company as a result of the rental of the cranes involved in this case was included in the gross receipts of Canton for the purposes of computing the franchise tax. In respect to those specific receipts this Court found that the tax was valid even though Canton attempted

to argue in that case that Canton was actually performing the stevedoring function.

The fact that the parties determined the consideration for the rentals by the number of tons moved by the cranes and by the amount of income received by The Cottman Company from the use of the unloading equipment, does not change the nature of the transaction and has no effect on the validity of the tax. See *Canton Railroad Co. v. Rogan, supra; Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this appeal be dismissed or that the decision of the Court of Appeals of Maryland be affirmed, the mandate to issue forthwith.

Respectfully submitted,

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